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SAMANDA HOLDINGS BERHAD

v.

SAKULLAH HOLDINGS SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CODE NO: D4-23-180-1988]
16 JANUARY 2006

C ***CIVIL PROCEDURE:*** *Summons in chambers - Rules of the High Court 1980, O. 14A & O. 33 r. 2 - Determination of question of law - Whether plaintiff can maintain and continue with action on existing statement of claim after execution of a settlement agreement and transfer of shares - Res judicata - Estoppel - Whether plaintiff estopped from*
D *doing so*

CIVIL PROCEDURE: *Res judicata - Estoppel - Action - Whether plaintiff can maintain and continue with action on existing statement of claim after execution of a settlement agreement and transfer of shares - Whether subject matter of suit ceased to exist - Whether plaintiff had*
E *estopped itself from exercising its alleged right of election under new deed of settlement - Whether suit dismissed*

This was a summons in chambers in encl. 56 filed by the plaintiff, on the one part, and the first, third, fourth and fifth defendants,
F on the other part, for an order pursuant to O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980 ('RHC') that the question of law set out in schedule A be determined accordingly *ie* whether the plaintiff could still maintain and continue with this action on the existing statement of claim filed on 20 January 1988
G after the execution of the settlement agreement dated 18 November 1993 and the transfer of the 6,000,000 ordinary shares in Sama World Asia Sdn Bhd to the plaintiff. In its existing statement of claim filed on 20 January 1988, the plaintiff sought for the repayment of the sum RM7,132,404.08 under the alleged
H deed of settlement dated 5 October 1987 against the first and second defendants (principal debtors) and against the third, fourth and fifth defendants (guarantors) and damages for breach of the term of the alleged deed of settlement dated 5 October 1987 to procure the release of the corporate guarantees. Thereafter, the
I parties entered into serious negotiations and the subject matter of the plaintiff's claim against all the defendants was settled when the

third defendant and the plaintiff executed a deed of settlement dated 18 November 1993 ('deed of settlement'). Pursuant to cl. 2(a) of the deed of settlement, the third defendant was to transfer, in settlement of the outstanding sum, 6,000,000 ordinary shares of RM1 each in Sama World Asia Sdn Bhd to the plaintiff as the legal and beneficial owner. On 13 December 1993, the third defendant delivered to the plaintiff a share certificate for the said 6,000,000 shares ('the shares') together with a duly executed instrument of transfer in favour of the plaintiff. Incidentally, cl. 3(a) of the deed of settlement conferred upon the third defendant a call option requiring the plaintiff to sell the shares to the third defendant/and or his nominees. On 26 November 1996, the plaintiff exercised its put option under cl. 3(c) of the deed of settlement and required the third defendant to buy the shares at a price of RM7.8 million, which amount the third defendant was required to pay within 30 days from 26 November 1996 pursuant to cl. 4(a) of the deed of settlement. On 27 December 1996, the plaintiff wrote to the third defendant pursuant to cl. 5 of the deed of settlement to make good the default under cl. 4(a) of the deed of settlement by paying the plaintiff the sum of 7.8 million. It was the plaintiff's stand that it subsequently informed the third defendant that in the light of the third defendant's default, the plaintiff had the right to elect either to accept the shares as full and final settlement or proceed with this action. The plaintiff thus elected to hold the shares as security and to proceed with the summary judgment application as well as the present action. The argument advanced by the plaintiff was that neither the execution of the deed of settlement and/or transfer of the shares could in any way preclude the plaintiff from maintaining and continuing with this action given that (a) the deed of settlement expressly allowed the plaintiff to elect to continue with this action; and (b) that it was agreed from the outset that the shares were to be transferred to the plaintiff subject to the put option and that on the third defendant's default of the put option, the deed of settlement expressly allowed the plaintiff to elect to hold the shares as security and to proceed with this action. The first, third, fourth and fifth defendants however argued that the plaintiff was estopped from maintaining or continuing with this action on the existing statement of claim filed on 20 January 1988 and that as a result of the deed of settlement dated 18 November 1993, the plaintiff had acquired a new right, namely, the right to elect whether to affirm the deed of settlement dated 18 November 1993 or to treat the said deed of settlement as wholly discharged.

Held (dismissing entire suit with costs):

(1) The plaintiff could not amend its existing statement of claim dated 20 January 1988 to bring forth and allege a new and subsequent cause of action by relying on the deed of settlement dated 18 November 1993 which was executed about five years ten months after the suit was commenced. The plaintiff could only do so by filing a fresh action. Further, by reason of the deed of settlement entered into between the plaintiff and the third defendant on 18 November 1993, the plaintiff must be deemed to have carried its alleged rights under the earlier alleged deed of settlement dated 5 October 1987 and the effect of which would be to release the fourth and fifth defendants of their roles as guarantors. (para 46)

(2) The plaintiff must be estopped from maintaining and/or continuing with this action on the existing statement of claim filed on 20 January 1988 after the execution of the deed of settlement dated 18 November 1993 and the transfer and registration of the 6,000,000 ordinary shares in Sama World Asia Sdn Bhd to the plaintiff. (para 61)

(3) The plaintiff was estopped from challenging or disputing that (1) the plaintiff had accepted the transfer and registration of the 6,000,000 shares in settlement of the outstanding sum pursuant to cl. 2(a) of the deed of settlement by reason of the fact that the call option and the put option had already occurred and that the deed of settlement had expressly provided that time was of the essence; (2) as a consequence thereof and by reason of the third defendant's performance under the deed of settlement, all the defendants have been released from their alleged liabilities to the plaintiff; (3) that the plaintiff's claim in this action has, in any event, been settled by accord and satisfaction; (4) that by such registration of the shares in its own name, the plaintiff had become the registered and beneficial owner of the shares and (5) that the settlement had extinguished, replaced and superseded all the prior obligations and causes of action of this suit. (para 61)

(4) The plaintiff was in breach of cl. 1(b) of the deed of settlement in failing to discontinue and withdraw this action upon the completion of the deed of settlement by the third defendant. In *Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co. Sdn Bhd*, the then Supreme Court held,

inter alia, that a blameable party could not be permitted to take advantage of his own wrong. Consequently, the subject matter of this suit had ceased to exist and since it had been discontinued as agreed in cl. 1(b) of the deed of settlement, it ought to be struck out. The first, third, fourth and fifth defendants have since 18 November 1993 believed, acted and arranged their affairs on the basis that this suit has been settled (this is where the doctrine of estoppel would come into play). The plaintiff has, by its conduct lost, estopped or disentitled itself from exercising its alleged right of election, if any, under the deed of settlement dated 18 November 1993. (para 61)

Case(s) referred to:

American Surety Co of New York v. Calgary Milling Co Ltd [1919] 48 DLR 295 ***(refd)***

Andrews v. Elliott [1855] 5 E & B 502 ***(refd)***

Antaios Compania Naviera SA v. Salen Rederierna AB [1983] 1 WLR 1362 ***(refd)***

Barrow Mutual Ship Insurance Co v. Ashburner [1885] 54 LJQB 377 ***(refd)***

Benson v. Hadfield [1844] 4 Hare 32 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Bradshaw v. McMullan [1920] 2 IR 412 ***(refd)***

Bright v. Tyndall [1876] 4 Ch D 189 ***(refd)***

Capital Corp Securities Sdn Bhd v. Kweh Chen Seng & Ors [2002] 5 MLJ 699 ***(refd)***

Central London Property Trust Ltd v. High Trees House Ltd [1947] KB 130 ***(refd)***

De Tchihatchef v. Salerni Coupling Ltd [1932] 1 Ch 330 ***(refd)***

Dunn v. Wyman [1881] 51 LJQB 623 ***(refd)***

Edwards v. Aberayron Mutual Ship Insurance Society [1876] 1 QBD 563 ***(refd)***

Exchange Bank of Yarmouth v. Blethen [1885] 10 App Cas 293 ***(refd)***

Faure Electric Accumulator Co Ltd v. Phillipart [1888] 58 LT 525 ***(refd)***

Gunasingam Ramasingam v. United Malayan Banking Corp & Another Appeal [2001] 3 CLJ 942 CA ***(refd)***

Haines v. East India Co [1856] 11 Moo PCC 39 ***(refd)***

Herman v. Royal Exchange Shipping Co and Patton, Jr & Co [1884] Cab & E 1 413 ***(refd)***

Hull Flax and Cotton Mill Co v. Wellesley [1860] 6 H & N 38 ***(refd)***

Gillett v. Holt & Anor [2002] 2 All ER 289 ***(refd)***

Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

Godfrey Phillips Ltd v. Investment Trust Corpn Ltd [1953] Ch 449 ***(refd)***

Gwyther v. Boslymon Quarries Ltd [1950] 2 KB 59 ***(refd)***

A *Herbert & Anor v. Vaughan & Ors [1972] 3 All ER 122* ***(refd)***
Hj Ahmat v. Ong Bak Hin [1960] 26 MLJ 20 ***(refd)***
Jones v. Bangor Mutual Shipping Insurance Society [1889] 61 LT 727 ***(refd)***
Jones v. North Vancouver Land and Improvement Co [1910] AC 317 ***(refd)***
Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors [1990] 1 CLJ 687; [1990] 1 CLJ (Rep) 141 SC ***(refd)***
B *Korea Foreign Insurance Co v. Omne Re SA [1999] Lloyd's Rep IR 509* ***(refd)***
Kuala Lumpur Landmark Sdn Bhd v. Standard Chartered Bank [1994] 2 MLJ 559 ***(refd)***
Lai Kok Kit Abdullah v. MBf Finance Bhd [2000] 3 CLJ 213 CA ***(refd)***
C *Maclaine v. Gatty [1921] 1 AC 376* ***(refd)***
Matthews v. Great Northern Rly Co [1859] 28 LJ Ch 375 ***(refd)***
Oakland Metal Co Ltd v. Benaim & Co Ltd [1953] 2 QB 261 ***(refd)***
Peyman v. Lanjani [1985] Ch 457 ***(refd)***
Re Coltman, Coltman v. Coltman [1881] 19 Ch D 64 ***(refd)***
D *Re St George's Steam Packet Co, Maguire's Case [1849] 3 De G & Sm 31* ***(refd)***
Republic of Bolivia v. Bolivion Navigation Co [1876] 24 WR 361 ***(refd)***
Ruby Steamship Corpn v. Commercial Union Assurance Co [1933] 46 LIL Rep 265 ***(refd)***
Roumeli Food Stores (NSW) Pty Ltd v. New India Assurance Co Ltd [1972] 1 NSWLR 227 ***(refd)***
E *Shrager v. Basil Dighton Ltd [1924] 1 KB 274* ***(refd)***
Sio Koon Lin & Anor v. SB Mehra [1981] 1 MLJ 225 ***(refd)***
Sim Siok Eng v. Government of Malaysia [1978] 1 MLJ 15 ***(refd)***
Toronto Rly Co v. Toronto Corpn [1904] AC 809 ***(refd)***
Tyerman v. Smith [1856] 6 E & B 719 ***(refd)***
F *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC* ***(refd)***
Williamson v. London And North Western Railway Company [1879] 12 Ch Div 787 ***(refd)***
Wing v. Harvey [1854] 5 De GM & G 265 ***(refd)***
G *York Tramways Co v. Willows [1882] 8 QBD 685* ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14A, O. 18 r. 10(1), O. 33 r. 2

Other source(s) referred to:
H Chang Min Tat, *Mallal's Supreme Court Practice*, 2nd edn, vol 1, p 201
David Foskett, *The Law and Practice of Compromise With Precedents*, p 125

Reported by Suhainah Wahiduddin

I

JUDGMENT

Abdul Malik Ishak J:

Question Of Law For Determination

[1] I was confronted with a summons in chambers in encl. 56 filed by the plaintiff, on the one part, and the 1st, 3rd, 4th and 5th defendants, on the other part, for an order pursuant to O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980 ("RHC") that the question of law set out in Schedule "A" be determined accordingly. The 2nd defendant was not involved in this legal manoeuvring since it was wound up on 28 February 1996. In Schedule "A", the question of law was phrased and framed in this way:

[2] Can the plaintiff still maintain and continue with this action on the existing statement of claim filed on 20 January 1988 after the execution of the settlement agreement dated 18 November 1993 and the transfer of the 6,000,000 ordinary shares in Sama World Asia Sdn Bhd to the plaintiff?

[3] In the event the issue as phrased and framed was answered in the negative, this would determine the action in favour of the 1st, 3rd, 4th and 5th defendants.

[4] But, in the event the issue as phrased and framed was answered in the affirmative, the action would proceed accordingly on the other issues arising.

[5] Ours is an adversarial system of procedure as compared to the inquisitorial system used in civil law jurisdictions. Thus, the question of law as phrased and framed would certainly expedite the disposal of this case, once and for all.

[6] It was a joint application by the parties for the disposal of the plaintiff's case on a point of law.

[7] It must be borne in mind that only questions of law that can be raised by the parties must necessarily arise in the action itself (*Republic of Bolivia v. Bolivion Navigation Co.* [1876] 24 WR 361), and it has always been the case that the court will not decide fictitious questions of law (*Bright v. Tyndall* [1876] 4 Ch. D 189; and *Sumner v. William Henderson & Sons* [1963] 1 WLR 823, [1963] 2 All ER 712, CA).

A **The Subject Matter Of The Plaintiff's Claim Under The Existing Statement Of Claim**

[8] In its existing statement of claim filed on 20 January 1988, the plaintiff sought to enforce its alleged rights against the B defendants based on the alleged deed of settlement dated 5 October 1987 (which was not the deed of settlement dated 18 November 1993 as alluded to in the question of law in Schedule "A") and an alleged letter of guarantee dated 5 October 1987 which the plaintiff alleged was entered into between the plaintiff C and the defendants. The plaintiff's alleged cause of action was principally founded on an alleged breach of the deed of settlement dated 5 October 1987.

[9] According to the plaintiff in its existing statement of claim D that under the alleged deed of settlement dated 5 October 1987 the following eventualities would occur:

(a) that the 1st and the 2nd defendants were to pay the plaintiff a sum of RM7,232,404.08 (see paras. 9 and 10 of the plaintiff's existing statement of claim);

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(b) that the 1st, 2nd, 3rd, 4th and 5th defendants would procure the release of the plaintiff's corporate guarantees (see para. 11 of the plaintiff's existing statement of claim); and

(c) that the 3rd, 4th and 5th defendants guaranteed the F repayment of the sum payable by the 1st defendant (see para. 16 of the plaintiff's existing statement of claim).

[10] The plaintiff asserted its claims in the existing statement of claim and sought judgment for the following reliefs:

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(i) the repayment of the sum of RM7,132,404.08 under the alleged deed of settlement dated 5 October 1987 against the 1st and the 2nd defendants as principal debtors and against the 3rd, 4th and 5th defendants as guarantors (see the H averments in paras. 17, 18, 19, 20 and 21 of the plaintiff's existing statement of claim); and

(ii) damages for breach of the term of the alleged deed of settlement dated 5 October 1987 to procure the release of the corporate guarantees (see the averment at para. 21(c) of the I plaintiff's existing statement of claim).

A New Event – The Settlement Of The Suit By Way Of The Deed Of Settlement Dated 18 November 1993 As Alluded To In The Question Of Law In Schedule "A"

[11] The parties entered into serious negotiations and the subject matter of the plaintiff's claim against all the defendants was settled on 18 November 1993 when the 3rd defendant and the plaintiff executed a deed of settlement dated 18 November 1993 (see para. 6 of the statement of agreed facts marked as "C"). A copy of the deed of settlement can be seen at pp. 62 to 69 of the common agreed bundle of documents. The settlement was arrived at after a period of about 5 years 10 months after this suit was commenced on 20 January 1988. Henceforth in this judgment, any reference to the deed of settlement would refer to the deed of settlement dated 18 November 1993 unless otherwise stated. Mention, however, will be made to the deed of settlement dated 18 November 1993 in order to highlight its significance.

[12] The parties to the deed of settlement were the plaintiff and the 3rd defendant but the contents of the said deed of settlement expressly dealt with the settlement of the claims against the 5th defendant and this very suit itself (see recital 5 of the deed of settlement and cls. 1(a), 1(b) and 6 of the deed of settlement). Now, recital 5 of the deed of settlement states as follows:

> 5. At the request of LTF, Samanda has agreed to accept a settlement of the outstanding sum by LTF in the manner and on the terms and conditions hereinafter contained.

[13] It must be borne in mind that "LTF" referred to in the deed of settlement was none other than the 3rd defendant and "Samanda" as stated in the deed of settlement referred to the plaintiff.

[14] Recital 4 of the deed of settlement clarified the meaning to be attached to the words "outstanding sum" and it states as follows:

> 4. As at 31st August 1993, the sum due and payable to Samanda by the defendants amounts to RM7,020,333.00 (hereinafter referred to as "the outstanding sum") made up as follows:
>
> Principal : RM4,306,752.00
> Interests : RM2,713,581.00
> Total : RM7,020,333.00

[15] I will now refer to some of the clauses of the deed of settlement. Clause 1(a) of the deed of settlement states as follows:

> 1(a). Upon the execution hereof, Samanda of the one part, LTF and the first, second, fourth and fifth defendants of the other part shall instruct and cause their respective solicitors to adjourn the application and the civil suits pending completion of the settlement herein envisaged.

Clause 1(b) of the deed of settlement is worded in this way:

> 1(b). Samanda shall cause their solicitors to discontinue and withdraw the civil suits and application upon the completion of the settlement herein envisaged.

Clause 6 of the deed of settlement states as follows:

> 6. Upon the completion of the Put and/or Call Options or the expiry of the Call Option Period, Extended Call Option Period or Call Option Period as the case may be, the defendants to the civil suit shall be deemed to have settled in full the outstanding sum due to Samanda whereupon all the defendants shall be released from the claims under the civil suit and Samanda will have no further claims whatsoever against the defendants provided always the terms and conditions of this Agreement has been observed and complied with.

[16] Now, pursuant to cl. 2(a) of the deed of settlement, the 3rd defendant was to transfer, in settlement of the outstanding sum, 6,000,000 ordinary shares of RM1 each in Sama World Asia Sdn Bhd to the plaintiff as the legal and beneficial owner. Clause 2(a) of the deed of settlement states as follows:

> 2(a). Subject always to the performance of the Put and/or Call Options referred to in clause 3, LTF shall, within twenty one (21) days from the date of this Agreement, cause to be transferred at his own cost and expense to Samanda 6,000,000 ordinary shares of RM1.00 each in Sama World Asia Sdn Bhd (these shares shall hereinafter be collectively referred to as "the said shares" which expression shall include all 6,000,000 shares or any part thereof) in settlement of the outstanding sum. LTF shall deliver the relevant share certificates together with duly executed transfer forms and all other relevant resolutions and documents to Samanda within the aforesaid 21 days period to the effect that Samanda shall be registered as the legal and beneficial owner of the said shares.

[17] On 13 December 1993, the 3rd defendant delivered to the plaintiff a share certificate bearing number 152 for the said 6,000,000 shares in Sama World Asia Sdn Bhd ("the shares") together with a duly executed instrument of transfer in favour of

the plaintiff pursuant to cl. 2(a) of the deed of settlement in order to enable the plaintiff to proceed with the registration of the shares in its name. By the very wording of cl. 2(a) of the deed of settlement, any transfer of the shares to the plaintiff shall be in settlement of the outstanding sum. On 14 February 1994, the board of directors of Sama World Asia Sdn Bhd passed a resolution approving the transfer of the shares to the plaintiff as the legal and beneficial owner. But for reasons unknown to the defendants, the plaintiff did not proceed to register the shares in its name. The plaintiff's blatant omission was brought to the attention of the 3rd defendant only on 25 February 1997 by way of a letter emanating from the plaintiff to the 3rd defendant dated 25 February 1997.

[18] Incidentally, cl. 3(a) of the deed of settlement conferred upon the 3rd defendant a call option requiring the plaintiff to sell the shares to the 3rd defendant and/or his nominees. Clause 3(a) of the deed of settlement states as follows:

> 3(a). In consideration of the settlement in clause 2 hereof and the mutual covenants stated herein Samanda hereby grants to LTF a call option requiring Samanda at any time during the call option period as defined in sub-clause (b) hereof to sell the said shares to LTF and/or his nominees at the purchase price as set out in Schedule 1 hereto (hereinafter called "the said purchase price") whereupon Samanda shall be bound to sell the said shares to LTF at the said purchase price.

[19] Under cl. 3(b) of the deed of settlement, the period for the exercise of the call option was 24 months from 18 November 1993 with an extension of one year at the option of the 3rd defendant. On 18 October 1995, the 3rd defendant exercised his option to extend the period to 18 November 1996.

[20] It must be borne in mind that the deed of settlement expressly provides that time is of the essence. Clause 10 of the deed of settlement states as follows:

> 10. Time wherever mentioned shall be of the essence of this Agreement.

[21] Meanwhile, cl. 3(c) of the deed of settlement allowed the plaintiff to exercise a put option requiring the 3rd defendant to buy the shares and that clause states as follows:

A 3(c). In further consideration of the mutual covenants and the settlement herein, LTF hereby grants to Samanda a put option which said put option shall be exercisable for a period of three (3) months after the expiry of the call option or extended call option as the case may be (hereinafter called "put option period") requiring LTF at any time to buy the shares at the said purchase price of RM1.30 per share whereupon LTF shall be bound to purchase the said shares at the said purchase price.

[22] On 26 November 1996, the plaintiff exercised its put option under cl. 3(c) of the Deed of Settlement and required the 3rd defendant to buy the shares at a price of RM7.8 million, which amount the 3rd defendant was required to pay within 30 days from 26 November 1996 pursuant to cl. 4(a) of the deed of settlement. Now, cl. 4(a) of the deed of settlement states as follows:

4(a). Payment for the shares upon the exercise of the put and/or call options as the case may be shall be made within 30 days of the exercise of the put and/or call options as the case may be.

[23] While cl. 4(b) of the deed of settlement is worded as follows:

4(b). Against payment of the said purchase price, Samanda shall deliver or cause to be delivered to LTF and/or his nominees the respective share certificates relating to the said shares together with the duly executed transfers for the same.

[24] And pursuant to cl. 5 of the deed of settlement, upon any default in payment by the 3rd defendant, the plaintiff had to elect "as soon as practicable" either to:

(a) accept the said shares as full and final settlement of the outstanding sum; or

(b) hold the said shares as security;

by forwarding a written notice to the 1st, 3rd, 4th and 5th defendants. It is germane to reproduce cl. 5 of the deed of settlement, at this juncture, and I shall do so now:

5. In the event of LTF shall fail and/or default in the payment for the said shares consequent upon the execise of the put or call option, as the case may be, Samanda shall issue a written notice to LTF to make good the said default and if within thirty (30) days after receipt of the said notice of default from Samanda, LTF fails to make good the said default Samanda shall have the right as in its sole and absolute discretion, to elect either:

(a) to accept the said shares as full and final settlement of the outstanding sum; or

(b) hold the said shares as security from LTF for the payment of all sums due under the civil suit and thereafter to proceed with the application and the civil suit.

And for this purpose, Samanda shall, as soon as practicable, give notice of its election to LTF and the solicitors for the First, Third, Fourth and Fifth defendants.

[25] On 27 December 1996, the plaintiff wrote to the 3rd defendant pursuant to cl. 5 of the deed of settlement to make good the default under cl. 4(a) of the deed of settlement by paying to the plaintiff the sum of RM7.8 million within 30 days (see the plaintiff's letter to the 3rd defendant dated 27 December 1996). It would now be ideal to refer to cl. 9 of the deed of settlement. That clause allows the plaintiff to claim its expenses and costs from the 3rd defendant on a solicitor/client basis in seeking to recover the outstanding sum or any balance thereof. That cl. 9 of the deed of settlement states as follows:

9. LTF hereby warrants and confirms that he shall bear and pay on a full indemnity basis all costs of this Deed including stamp duties, fees or other charges payable on or incidental to the execution of this Deed (including the stamp duties for the transfer of shares) and all expenses and/or costs as may be incurred by Samanda on a solicitor/client basis in seeking recovery of the outstanding sum or any balance thereof.

[26] It was the stand of the plaintiff that the plaintiff subsequently informed the 3rd defendant that in the light of the 3rd defendant's default, the plaintiff has the right to elect either to accept the shares as full and final settlement or proceed with this action and it was said that the plaintiff was unable to make any election at the present moment because the shares have not been registered in the plaintiff's name.

[27] It was said that the plaintiff and the 3rd defendant subsequently took the necessary steps to have the shares registered in the plaintiff's name. It was emphasised that the plaintiff subsequently elected to hold the shares as security and to proceed with the summary judgment application as well as the present action.

[28] It was argued on behalf of the plaintiff that the question of law as phrased and framed ought to be answered in the affirmative. Whereas the 1st, 3rd, 4th and 5th defendants argued

to the contrary and vigorously submitted that the question of law should be answered in the negative.

Arguments Advanced By The Plaintiff

[29] It was argued that the fact that the deed of settlement was executed did not preclude the plaintiff from maintaining and continuing with the present action. It was emphasised that cl. 5 of the deed of settlement expressly preserves the plaintiff's right to elect to proceed with the present action. My attention was drawn to a book entitled *"The Law And Practice Of Compromise With Precedents"* by David Foskett and with a contribution from David Hodge. In that book, the learned authors wrote at p. 125 to the following effect:

> Generally speaking, therefore, an agreement of compromise will discharge all original claims and counterclaims unless it expressly provides for their revival in the event of breach. Where a party is anxious to be able to revive his original claim in the event of the other party's failure to comply with his obligations under the compromise, a term to that effect should be incorporated. Any judgment or order made reflecting such an agreement would need to be drafted in such a way as to give effect to this intention.

[30] And this very passage was quoted with approval by Anuar J (who later rose to be the Chief Judge of Malaya) in the case of *Kuala Lumpur Landmark Sdn Bhd v. Standard Chartered Bank* [1994] 2 MLJ 559 at p. 569, but his Lordship found that on the facts there that the compromise agreement did not expressly provide for a revival of the original claim. The English Court of Appeal with a coram of Evans and Brooke LJJ in the case of *Korea Foreign Insurance Co v. Omne Re SA* [1999] Lloyd's Rep IR 509 also cited with approval the same passage in David Foskett's book and there the Court of Appeal found that the effect of the compromise agreement was to give the plaintiffs there the right to elect whether to pursue the original agreement or the compromise agreement even though such a right of election was not expressly provided for. The same principle of law was also recognised by Rekhraj J, in *Capital Corp Securities Sdn Bhd v. Kweh Chen Seng & Ors* [2002] 5 MLJ 699 when his Lordship said at p. 703 of the report:

> Further, the parties to the compromise or settlement were sui juris, and therefore the settlement or compromise so entered into between them had constituted a new and independent agreement, made for a good and valuable consideration, the full effect of which was to put an end to the earlier cause of action which

became spent and exhausted, unless the parties to the proceedings herein had reserved for themselves the liberty to enforce the original cause of action or claim in the event the compromise agreement was vitiated; and which they had failed to do so.

[31] Applying these salient authorities, it was argued by the plaintiff that cl. 5 of the deed of settlement expressly provided that the plaintiff may elect to hold the shares as security and proceed with this action in the event of default. It was further argued by the plaintiff that the conduct of the parties in this action also confirmed that it was the intention of the parties all along that this action was to be preserved. It was pointed out that this action was adjourned sine die in 1993 pending settlement and that after the deed of settlement was executed the defendants did not at any time request the plaintiff to discontinue this action.

[32] An argument was advanced by the plaintiff that the fact that the shares were transferred to the plaintiff was not that material. It was neither here nor there. It was argued that from the outset it was envisaged and expressly provided by cl. 2(a) of the deed of statement that the shares were to be transferred to the plaintiff as the legal and beneficial owner subject to the put option. It was emphasised that the deed of settlement expressly allows the plaintiff to elect to hold the shares as security and continue with this action. Flowing from all these, it was argued that it was clear that the transfer of the shares *per se* did not in any way fully and finally settle the plaintiff's claim. The shares were, it was argued, always to be transferred to the plaintiff subject to the put option and the consequences of the default was expressly agreed in cl. 5 of the deed of settlement.

[33] By way of a summary, it can be discerned from the arguments advanced by the plaintiff that neither the execution of the deed of settlement and/or the transfer of the shares can in any way preclude the plaintiff from maintaining and continuing with this action given that:

(a) the deed of settlement expressly allows the plaintiff to elect to continue with this action; and

(b) that it was agreed, from the outset, that the shares were to be transferred to the plaintiff subject to the put option and that on the 3rd defendant's default of the put option, the deed of dettlement expressly allows the plaintiff to elect to hold the shares as security and to proceed with this action.

[34] For the reasons as set out above, and in the circumstances of the present case, the plaintiff craved this court's indulgence that the question of law phrased and framed in the way as set out earlier in Schedule "A" be answered in the affirmative and that this action be allowed to proceed accordingly.

Arguments Advanced By The 1st, 3rd, 4th And 5th Defendants

[35] It was argued by the 1st, 3rd, 4th and 5th defendants that the plaintiff was estopped from maintaining or continuing with this action on the existing statement of claim filed on 20 January 1988. And that as a result of the deed of settlement dated 18 November 1993, the plaintiff has acquired a new right, namely, the right to elect whether to affirm the deed of settlement dated 18 November 1993 or to treat the said deed of settlement as wholly discharged. The doctrine of estoppel was put in the forefront by the 1st, 3rd, 4th and 5th defendants and I shall allude to it in the later part of this judgment.

Analysis

[36] By reason of the deed of settlement dated 18 November 1993, the plaintiff's rights were confined within the four walls of the said deed of settlement. The plaintiff can only seek to assert any claims under the deed of settlement dated 18 November 1993. In my judgment, cl. 5 of the deed of settlement clearly conferred on the plaintiff the right or the choice to institute a new suit based upon the original causes of action pursuant to and not outside the purview of the deed of settlement dated 18 November 1993. The plaintiff's alleged cause of action in the existing statement of claim was founded on an alleged breach by the 1st and the 2nd defendants of the terms of an alleged deed of settlement dated 5 October 1987. The deed of settlement dated 18 November 1993 was nowhere averred in the plaintiff's existing statement of claim. The plaintiff was estopped from alleging those rights, if any, under the deed of settlement dated 18 November 1993 in the plaintiff's reply to the defence of the 1st, 3rd, 4th and 5th defendants. The proper and the only place to do so would be by filing a fresh action. Order 18 r. 10(1) of the RHC states as follows:

> 10. Departure (O. 18 r. 10)
>
> (1) A party shall not in any pleading make an allegation of fact, or raise any new ground or claim, inconsistent with a previous pleading of his.

[37] That would be the prevailing legal position and it finds support in the following legal pronouncements. A

[38] In *Mallal's Supreme Court Practice*, 2nd edn by Tan Sri Datuk Chang Min Tat, vol. 1, at p. 201, it was stated as follows: B

> Scope of the rule: This rule aims at preventing a departure in pleading. A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading, and resorts to another and a different ground.

[39] In *Haji Ahmat v. Ong Bak Hin* [1960] 26 MLJ 20, Hepworth J, aptly said at p. 21 of the report: C

> But O. 19 r. 16 aims at preventing a departure in pleading. A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading, and resorts to another and a different ground (*Odgers on Pleading and Practice,* 15th Edn., P. 232.). D

[40] In *Williamson v. London And North Western Railway Company* [1879] 12 Ch Div 787, the headnotes at p. 788 carries the following legend: E

> Then in a subsequent part of his reply the Plaintiff submitted (which was a case that he had not made by his previous pleadings) that he was entitled to recover these penalties in the present action, or, if the court should be of opinion that they were not recoverable therein, in another action in the High Court of Justice. F

[41] And Hall VC, delivering the judgment of the court aptly said at p. 792 of the report: G

> The view that I take of this case is, that, from the frame of this reply, the Defendants are embarrassed with reference to the course which they are to take in their further proceedings in this action; and I think it will suffice for the purpose of dealing with this application to say that, in my judgment, this reply is not a proper pleading at all, having regard to what is required by the Rules and the Orders as to that which is defined as a reply. For H I consider that the reply should, in itself, contain all that can be called pleading. In making that observation, I refer to what I consider is a fatal defect in this reply, the not inserting in the reply that which is only to be found there by way of reference to the answers to the interrogatories. I

[42] Continuing at p. 793 of the report, Hall VC had this to say:

> There are other features in this case which seem to point to this pleading not being such as the Court would be disposed to sanction. It is not necessary to say whether they of themselves, and without what I have already adverted to, would be sufficed to justify the course I take, but I am very much disposed to think that the objection that the reply sets up new claims is a good objection; for, although it has been said that penalties claimed by the reply which are not claimed in the statement of claim or the writ must be disregarded, still there are the claims put forward, and the pleader for the Defendants is embarrassed by them. It is not for him to take upon himself to disregard them altogether and to refrain from going into any rejoinder because, if the claims for penalties had been brought forward properly, he would have been able to shew that either by conduct or in fact the penalties had been released and given up, and therefore that they could not be claimed. He is not to be embarrassed by considering whether the Court, when the matter comes to a hearing, will let the Plaintiff, supposing he fail in everything else, fall back upon or claim some of those penalties in the nature of damages or otherwise, instead of having the specific relief which he claims in respect of this particular right of access in the one way or the other, either under the bridge or upon a level crossing. It seems to me that is another substantial and important objection to this pleading.

[43] Goff J, in *Herbert and Another v. Vaughan and Others* [1972] 3 All ER 122, in style said that (see p. 128 of the report):

> If the plaintiffs cannot prove other facts on which they would wish to rely for the purpose of establishing undue influence on the part of Mr Roch, that is unfortunate but arises in any event from the fact that they wish, if necessary, to have the gift set aside on the ground of Mr Roch's undue influence, and the particulars disclose that they are asserting that not merely as an implication from the relationship but also on other grounds as a case of express undue influence. If they want to set that up, they must allege and prove it, and the statement of claim is the proper place in which it ought to be alleged.
>
> Counsel for the plaintiffs also relied on rr. 3 and 8 of RSC Ord 18, but they must be read in the context of the whole of the order including r. 10 and the practice of the court. Rules 3 and 8 cannot, in my judgment, require or even authorise the inclusion in a reply of something which ought to be in the statement of claim.

[44] In *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1982] CLJ 547; [1982] CLJ (Rep) 358, FC, Raja Azlan Shah Ag. LP (as his Highness then was) delivering the judgment of the Federal Court had this to say:

This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the Statement of Claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co. v. Parr* [1892] 2 QB 14 where Mathew J, said that "it is most important that a defendant should know from the writ what the exact claim against him is.

[45] Chang Min Tat FJ delivering the judgment of the Federal Court in *Sio Koon Lin & Anor. v. S.B. Mehra* [1981] 1 MLJ 225 succinctly said at p. 226 of the report:

If as at October 7, the respondent had no right of action to claim for the $35,000, it is clear that any amendment would be to introduce a new cause of action which did not exist at the date of the writ and if the leave of the court is necessary, it would be refused: *Eshelby v. Federated European Bank* [1932] 1 KB 254; [1932] 1 KB 423, CA. But as noted, the amendment was made without any requirement for leave and before delivery of the statement of defence. A subsequent application by the appellants to strike out the amendment on the ground that no leave was given for it was, after argument in open court, dismissed. With this order of court, the pleadings must be read as amended. If the effect of the amendment was to determine the cause of action as at the date of the amendment, that is, on October 14, 1972, the respondent would be clearly entitled to $35,000, an installment due and owing. And if not, but the cause of action was to be determined at the date of the writ, then he would not be. On the authority of *Sneade v. Wotherton, etc. Co.* [1904] 1 KB 295, in which Collins M.R. held at page 297

> the writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed.

the amendment dated back to the date of the original issue of the writ and the action continued as though the amendment had been inserted from the beginning.

It follows that the High Court erred in ruling that the respondent had on October 7, 1972 any cause of action in respect of the $85,000 or any part thereof. We come to this conclusion because authority compels us but with considerable sympathy for the respondent. What he should have done of course was to start another action or actions for the installments as and when they fell due for payment but remained unpaid.

[46] Now, applying all these salient principles of law to the facts of the present case, I must categorically say that the plaintiff cannot amend its existing statement of claim dated 20 January 1988 to bring forth and allege a new and subsequent cause of

A action by relying on the deed of settlement dated 18 November 1993 which was executed about 5 years 10 months after the suit was commenced. The plaintiff can only do so by filing a fresh action. Further and/or in the alternative, it must be borne in mind that by reason of the deed of settlement entered into between the B plaintiff and the 3rd defendant on 18 November 1993, the plaintiff must be deemed to have varied its alleged rights under the earlier alleged deed of settlement dated 5 October 1987 and the effect of which would be to release the 4th and 5th defendants of their roles as guarantors. If authority was required, the case of *Kidurong* C *Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors* [1990] 1 MLJ 485 would be an appropriate authority. There, Lee Hun Hoe CJ (Borneo) writing for the Supreme Court had this to say (see p. 493 of the report):

D Section 86 of the Contracts Act 1950 provides that:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

E This section came up for construction in *Citibank NA v. Ooi Boon Leong* [1981] 1 MLJ 282 where Raja Azlan Shah, then LP, observed as follows at p 283:

> The section provides express provision for the respondents to consent to any variation. They are the sole judges F whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented they will be discharged. This provision is in accordance with what is stated to be the law by Cotton LJ in *Holme v. Brunskill* [1878] 3 QBD 498 which was followed in the Privy Council in *National Bank of Nigeria* G *Limited v. Awolesi* [1964] 1 WLR 1311 at p 1316:
>
> > The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the H alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is I unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration … but will hold that in such a case the

surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

The onus of proving that the surety consented to the alterations of the contract is upon the party seeking to enforce the guarantee. (See *Law on Guarantee* by McGuinness, p 12; Rowlatt on *Principles of Surety*, p 90; O'Donnovan Philips on *Modern Contracts on Guarantee*, pp 269, 270; *General Steam Navigation Co v Rolt* [1858] 6 CB (NS) 550; 141 ER 572).

Mere knowledge of the variation is insufficient. There must be consent to the variation, although implicit consent may be inferred. However, the authorities establish that implied consent may be inferred only in particular circumstances, examples of which are where the guarantor himself arranges the variation (see *Wren v. Emmett Contractors Pty Ltd* [1969] 43 ALJR 213); where he is involved with the preparation of documents necessary for its execution (see *Woodstock v. Oxford & Worcester Railway Company* [1853] 61 ER 551); where a guarantor is a director of the principal company and he negotiates with the creditor in that capacity, he will seldom if ever, be allowed to plead that he has not assented to the variation in his capacity as a guarantor but only in his capacity as a director of the principal debtor (see Mahon J at p 96 in *Winstone v. Bourne* [1978] 1 NZLR 94; see also generally *Coronation Electronics Ltd v. Lalchand Mahtani* [1987] 1 MLJ 190).

[47] In regard to the argument that the plaintiff had accepted the shares in full satisfaction, I have this to say. On 13 December 1993, the 3rd defendant delivered to the plaintiff the share certificate number 152 for 6,000,000 ordinary shares in Sama World Asia Sdn Bhd together with a duly executed instrument of transfer in favour of the plaintiff and that on 14 February 1994 the Board of Directors of Sama World Asia Sdn Bhd passed a resolution approving the transfer of the said shares to the plaintiff as the legal and beneficial owner (see paras 8 and 9 of the statement of agreed facts marked as "C"). And copies of the letter from the company's secretary of Sama World Asia Sdn Bhd dated 13 December 1993 together with the said resolution can be seen in bundle "A". Incidentally, by virtue of cl. 2(a) of the deed of settlement dated 18 November 1993 the plaintiff proceeded to register the 6,000,000 ordinary shares in its name as settlement of the outstanding sum.

[48] For reasons unknown to the defendants, the plaintiff did not proceed to register the shares in its name. The plaintiff in fact kept silent for a period of about three (3) years after 13 December 1993. The plaintiff must be estopped from challenging or disputing that:

(a) the plaintiff ought to have immediately proceeded to register the shares in its name; and that

(b) the plaintiff's failure to register the shares in its name cannot be held adversely against the 1st, 3rd, 4th and 5th defendants.

[49] In *Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd.* [1987] 1 CLJ 123; [1987] CLJ (Rep) 302, Wan Hamzah SCJ delivering the judgment of the Supreme Court aptly said:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd. v. S.D.A.E.C.D. France* [1919] AC 1. In the present case the first defendant alleges that it had not obtained the consent of the plaintiff company to cease to operate at the address stated in clause 14(ii). Therefore the first defendant being the blameable party cannot be permitted to take advantage of his own wrong in ceasing to operate at that address without the consent of the plaintiff company, to put an end to the agency agreement.

[50] In *Lai Kok Kit @ Sulaiman Lai bin Abdullah v. MBf Finance Bhd* [2000] 3 CLJ 213, Gopal Sri Ram JCA said at p. 223 of the report:

> That brings us to Cik Paramjit's argument that her client was entitled to revert to the original position if there was no frustration. The simple answer to her submission is this.
>
> The primary obligation under the second agreement was on the defendant to do what it promised, namely to have the order for sale cancelled or withdrawn. By June 1991 (date of the alleged default by the plaintiff) that obligation remained plainly unfulfilled. Since the defendant had breached its part of the bargain it does

not lie on its mouth to complain of the plaintiff's default. In our judgment, the plaintiff was clearly within his rights to refuse to continue performance of his obligations under the contract in view of the defendant's default. The clause in the second agreement upon which the defendant relies is accordingly of no assistance to it.

[51] Now, on receipt of the plaintiff's letter addressed to the 3rd defendant dated 27 December 1996, the 3rd defendant attended a meeting with the plaintiff's representatives and at that meeting the 3rd defendant had proposed that the plaintiff should accept the said shares in satisfaction of the outstanding sum by virtue of cl. 5(a) of the deed of settlement dated 18 November 1993.

[52] On 25 February 1997, the plaintiff wrote to the 3rd defendant alleging that the 3rd defendant had defaulted under the deed of settlement and stated that the plaintiff was unable to make the decision under cl. 5 of the deed of settlement and had also requested for certain documents from the 3rd defendant. It must be recalled that the plaintiff did not previously ask for those documents when the 3rd defendant delivered share certificate number 152 for the 6,000,000 shares in Sama World Asia Sdn Bhd to the plaintiff on 13 December 1993. It must also be recalled that the plaintiff chose to keep silent for more than 3 years after 13 December 1993. On 7 March 1997, the 3rd defendant provided the required documents to the plaintiff and categorically stated that the onus was on the plaintiff to obtain the necessary approval from the Foreign Investment Committee.

[53] On 25 March 1997, the plaintiff wrote to the 3rd defendant enclosing certain documents for execution and requesting the 3rd defendant to pay a sum of RM174,813.32 being the estimated stamp duty for the transfer of the shares to the plaintiff. On 27 March 1997, the 3rd defendant wrote to the plaintiff stating that he would complete the exercise to have the shares registered in the name of the plaintiff and that the onus was on the plaintiff to obtain the actual assessed amount of stamp duty and that the 3rd defendant would pay the stamp duty once the amount has been assessed.

[54] On 29 April 1997, the plaintiff wrote to the 3rd defendant and requested for copies of certain audited accounts. The 3rd defendant duly furnished the plaintiff the audited accounts on 6 May 1997.

[55] On 18 September 1997, the stamp office issued a notice to the plaintiff stating that the adjudicated stamp duty in respect of the transfer of the shares to the plaintiff was in the sum of RM21,061.20. The plaintiff then wrote to the 3rd defendant on 25 September 1997 forwarding the said notice. The 3rd defendant paid the adjudicated stamp duty sum to the plaintiff as reflected in two letters dated 30 September 1997 and 2 October 1997.

[56] On 22 October 1997, the plaintiff wrote to the 3rd defendant requesting for the 3rd defendant's assistance to request the company secretary of Sama World Asia Sdn Bhd to issue a notice to the plaintiff to bring certain documents to the said company secretary in order to enable the latter to issue a new share certificate for the 6,000,000 shares in the plaintiff's name. At para. 2 of the letter dated 22 October 1997, the documents which were required to effect the transfer of the 6,000,000 shares to the plaintiff were:

(a) the transfer as per Form 32A; and

(b) the share certificate number 152 for the 6,000,000 shares.

[57] It must be borne in mind that these two documents as mentioned above were the very documents that the 3rd defendant delivered to the plaintiff as early as 13 December 1993 in order to assist the plaintiff to proceed with the registration of the shares in its name.

[58] On 7 November 1997, the company secretary of Sama World Asia Sdn Bhd wrote to the plaintiff and requested for the return of the above two documents so that a new share certificate would be issued in favour of the plaintiff for the said 6,000,000 shares. The plaintiff responded by letter dated 14 November 1997 and returned the said two documents. The plaintiff's letter dated 14 November 1997 made clear reference to the share certificate number 152 and Form 32A and these two documents had been sent to the plaintiff by the 3rd defendant about four years earlier under cover of the 3rd defendant's letter dated 13 December 1993.

[59] On 18 November 1997, the company secretary of Sama World Asia Sdn Bhd responded to the plaintiff's letter dated 14 November 1997 and delivered to the plaintiff the share certificate number 222 for the said 6,000,000 shares which certificate was issued in the plaintiff's name. On 18 November 1997, the plaintiff returned the acknowledgement slip for the share certificate number 222 to the said company secretary.

[60] On 16 December 1997, the plaintiff wrote to Sama World Asia Sdn Bhd in exercising the plaintiff's beneficial rights as shareholder of the said 6,000,000 shares in approving the plaintiff's nominee as the plaintiff's representative on the Board of Directorship of Sama World Asia Sdn Bhd. The subject matter of the plaintiff's letter dated 16 December 1997 had not made any reference to the "settlement agreement" and to the "Put Option" as compared to the plaintiff's previous letters. But the plaintiff's letter dated 16 December 1997 constituted clear evidence that in so far as the plaintiff was concerned, the settlement had been completed. The plaintiff had also enclosed a copy of the nominee's identity card with the plaintiff's letter. And thereafter there was no more communication forthcoming from the plaintiff.

[61] The plaintiff must be estopped from maintaining and/or continuing with this action on the existing statement of claim filed on 20 January 1988 after the execution of the deed of settlement dated 18 November 1993 and the transfer and registration of the 6,000,000 ordinary shares in Sama World Asia Sdn Bhd to the plaintiff by way of a share certificate number 222. In my judgment, the plaintiff was estopped from challenging or disputing:

(1) that the plaintiff had accepted the transfer and registration of the 6,000,000 shares in share certificate number 222 in settlement of the outstanding sum pursuant to cl. 2(a) of the deed of settlement by reason of the fact that the call option and the put option had already occurred and that the deed of settlement had expressly provided that time was of the essence;

(2) that as a consequence thereof and by reason of the 3rd defendant's performance under the deed of settlement, all the defendants have been released from their alleged liabilities to the plaintiff;

(3) that the plaintiff's claim in this action has, in any event, been settled by accord and satisfaction;

(4) that by such registration of the shares in its own name, the plaintiff has become the registered and beneficial owner of the shares;

(5) that the settlement had extinguished, replaced and superseded all the prior obligations and causes of action of this suit;

(6) that the plaintiff was in breach of cl. 1(b) of the deed of settlement in failing to discontinue and withdraw this action

upon the completion of the deed of settlement by the 3rd defendant and in *Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd. (supra)*, the then Supreme Court held, *inter alia*, that a blameable party cannot be permitted to take advantage of his own wrong;

(7) that the plaintiff's alleged causes of action founded on paras 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the existing statement of claim had been extinguished, ceased to exist and had become non-actionable;

(8) that, consequently, the subject matter of this suit has ceased to exist and since it had not been discontinued as agreed in cl. 1(b) of the deed of settlement, it ought to be struck out;

(9) that the 1st, 3rd, 4th and 5th defendants have since 18 November 1997 believed, acted and arranged their affairs on the basis that this suit has been settled (this is where the doctrine of estoppel would come into play); and

(10) that the plaintiff has by its conduct lost, estopped or disentitled itself from exercising its alleged right of election, if any, under the deed of settlement dated 18 November 1993.

[62] As promised, I will now say something about the doctrine of estoppel. It was relied heavily by the 1st, 3rd, 4th and 5th defendants. Every law student is enthralled and captivated by the word "estoppel". It evokes a lot of things. It stirs the mind to wonder. There are various types of estoppel and the most famous and popular is known as equitable or promissory estoppel. It has been developed and fine tuned in *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130. It is now known as the High Trees doctrine. It may be stated as follows. That a party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resile from that stand unless he has given reasonable notice of his intention to revert to the original position (*Sim Siok Eng v. Government of Malaysia* [1978] 1 MLJ 15, FC). Gopal Sri Ram JCA, sitting in the Federal Court, in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 observed that the doctrine of estoppel is quite flexible and that it would apply to varying fact situations (*American Surety Co of New York v. Calgary Milling Co Ltd* [1919] 48 DLR 295; and *De Tchihatchef v. Salerni Coupling Ltd* [1932] 1 Ch 330).

[63] Two requirements must be present before the doctrine of estoppel is invoked. There must be the existence of inducement and detriment. Indeed, the English Court of Appeal in *Gillett v. Holt and Another* [2002] 2 All ER 289, CA had occasion to consider whether the element of detriment has to be established as an essential ingredient of proprietary estoppel. Robert Walker LJ, in delivering the main judgment of the English Court of Appeal aptly said at p. 301 of the report.:

> … reliance and detriment are often intertwined, and that whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.

[64] Continuing at p. 308 of the report, Robert Walker LJ said:

> There are some helpful observations about the requirement for detriment in the judgment of Slade LJ in *Jones v. Watkins* [1987] CA Transcript 1200. There must be sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment must be pleaded and proved.

[65] In the context of the present case, I was concerned about representation made by conduct. And whether a course of conduct amounts to a representation would vary from case to case. A party can only be held to be estopped when his conduct is unequivocal (*Peyman v. Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA). Examples of representations by conduct are abound. Thus, the acceptance of money paid in consideration of the existence of a certain state of things often estops the receiver from denying the existence of that state of things. Likewise, the acceptance of premiums with full knowledge of the circumstances that would entitle the insurer to avoid the insurance policy estops the insurer from arguing that it is not a valid insurance policy (*Wing v. Harvey* [1854] 5 De GM & G 265; *Edwards v. Aberayron Mutual Ship Insurance Society* [1876] 1 QBD 563, Ex Ch; *Jones v. Bangor Mutual Shipping Insurance Society* [1889] 61 LT 727; *Roumeli Food Stores (NSW) Pty Ltd v. New India Assurance Co Ltd* [1972] 1

NSWLR 227; *Herman v. Royal Exchange Shipping Co and Patton, Jr & Co* [1884] Cab & E 1 413; *Re Coltman, Coltman v. Coltman* [1881] 19 Ch D 64, CA; *Exchange Bank of Yarmouth v. Blethen* [1885] 10 App Cas 293, PC; *Dunn v. Wyman* [1881] 51 LJQB 623; *Bradshaw v. McMullan* [1920] 2 IR 412, HL; *Godfrey Phillips Ltd v. Investment Trust Corpn Ltd* [1953] Ch 449, [1953] 1 All ER 7; *Matthews v. Great Northern Rly Co* [1859] 28 LJ Ch 375; *Maclaine v. Gatty* [1921] 1 AC 376, HL; *Ruby Steamship Corpn v. Commercial Union Assurance Co* [1933] 46 LIL Rep 265, CA, and *Gwyther v. Boslymon Quarries Ltd* [1950] 2 KB 59, [1950] 1 All ER 384). Even a director of a company who takes part in confirming the allotment of shares to himself cannot be heard to say that the allotment of shares was irregular (*York Tramways Co v. Willows* [1882] 8 QBD 685 at 699, CA; *Faure Electric Accumulator Co Ltd v. Phillipart* [1888] 58 LT 525; *Benson v. Hadfield* [1844] 4 Hare 32; *Jones v. North Vancouver Land and Improvement Co* [1910] AC 317, PC; *Hull Flax and Cotton Mill Co v. Wellesley* [1860] 6 H & N 38; *Re St George's Steam Packet Co, Maguire's Case* [1849] 3 De G & Sm 31; and *Barrow Mutual Ship Insurance Co v. Ashburner* [1885] 54 LJQB 377, CA). And the parties to the litigation who had knowledge of the irregularity of which they might have availed themselves are afterwards estopped from setting it up. It is an essential requirement that there must be knowledge (*Oakland Metal Co Ltd v. Benaim & Co Ltd* [1953] 2 QB 261, [1953] 2 All ER 650; *Toronto Rly Co v. Toronto Corpn* [1904] AC 809 at 815, PC, *Tyerman v. Smith* [1856] 6 E & B 719; *Andrews v. Elliott* [1855] 5 E & B 502; *Shrager v. Basil Dighton Ltd* [1924] 1 KB 274, CA; and *Haines v. East India Co* [1856] 11 Moo PCC 39).

[66] So much for the brief discourse on the law and they would surely apply to the facts of the present case at hand.

[67] I will now address the events that happened subsequent to the court's notice dated 17 August 1999. By letter dated 17 August 1999, this court fixed on its own motion this suit for mention on 17 September 1999. Neither the plaintiff nor the defendants had requested the court to fix a date for mention. On 13 September 1999, Messrs Lee Hishammuddin wrote a letter to Messrs Ranjit Thomas & Kula stating, *inter alia*, that:

(a) Messrs Lee Hishammuddin was now acting for the plaintiff; and

(b) that the plaintiff was allegedly electing under cl. 5 of the deed of settlement dated 18 November 1993 to hold the shares as security from the 3rd defendant for the payment of all sums due under this suit and will be proceeding with the O. 14 of the RHC's application as well as this suit.

[68] I must at once say that the purported or alleged election by the plaintiff's solicitors in their letter dated 13 September 1999 was invalid for the following reasons:

(a) that it was inconsistent with the acts, intention and conduct of the plaintiff where it was very clear that the plaintiff had elected to accept the share certificate number 222 for the 6,000,000 shares in full satisfaction of the outstanding sum;

(b) that it did not satisfy the requirement of "as soon as practicable" as stipulated in cl. 5 of the deed of settlement dated 18 November 1993 especially where the parties have expressly agreed that time will be of the essence;

(c) that it must be borne in mind that the shares were registered in the plaintiff's name on 18 November 1997 whereas the letter from Messrs Lee Hishammuddin was issued on 13 September 1999 which in point of time there was a gap of about 1 year 10 months later;

(d) that it was incorrect, manifestly misconceived, unfair, unjust and inequitable; and

(e) that the plaintiff was attempting to distort the agreement that was already reached.

[69] The sum total of it all would be this. That the plaintiff was estopped from denying:

(1) the intent and purport of the deed of settlement dated 18 November 1993;

(2) that the plaintiff had elected to accept the shares in satisfaction;

(3) that the delay by the plaintiff gave rise to a legitimate expectation that the plaintiff had accepted the shares in full settlement of the outstanding sum; and

(4) that the parties had proceeded on the basis that the plaintiff had elected to accept the shares in full satisfaction of the outstanding sum pursuant to cl. 2(a) and cl. 5(a) of the deed of settlement dated 18 November 1993.

[70] In *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1983] 1 WLR 1362, Ackner LJ, writing separately for the English Court of Appeal, said at p. 1372 of the report:

> The arbitrators specifically rejected that there was any foundation in the evidence for a claim based on estoppel and then considered the final contention of the charterers that the period from the first week in April until May 20 was 'by itself so long that the owners lost their right to withdraw independently of all the above matters'. In support of this submission the charterers relied on the observations of Lord Wilberforce in *The Laconia* [1977] AC 850, 872:
>
> > The owners must within a reasonable time after the default give notice of withdrawal to the charterers. What is a reasonable time – essentially a matter for arbitrators to find – depends on the circumstances. In some, indeed many cases, it will be a short time – *viz.* the shortest time reasonably necessary to enable the shipowner to hear of the default and issue instructions.
>
> As to this submission, the arbitrators concluded that the critical period was from May 7 to 20, since, as previously stated, before May 7 the owners did not have the knowledge of the breach. The arbitrators concluded:
>
> > In view of the owners' long-standing and firm belief, as from the first or second week of April, that the breach had been committed there was in our view no need on May 7 for the owners to wait any longer whether to obtain legal advice, which could have been obtained earlier, or to obtain further information or to make up their minds or for any other reason. In particular, there was no need for a meeting to take place in Piraeus or anywhere else to enable the owners to decide whether or not to withdraw the vessel … We therefore find that a reasonable time for withdrawing the vessel expired on May 9, at the latest, and that the notice of withdrawal on May 20 was not given within a reasonable time.

[71] And Fox LJ writing separately for the English Court of Appeal had this to say at p. 1376 of the report:

> Now whatever the basis of the rule, there seems no doubt as to its existence. Lord Wilberforce's statement of it in *The Laconia* [1977] AC 850, 872 is that:
>
> > The owners must within a reasonable time after the default give notice of withdrawal to the charterers. What is a reasonable time – essentially a matter for arbitrators to find – depends on the circumstances. In some, indeed many

> cases, it will be a short time – *viz*. the shortest time reasonably necessary to enable the shipowner to hear of the default and issue instructions. If, of course, the charterparty contains an express provision regarding notice to the charterers, that provision must be applied.

In *China National Transportation Corporation v. Evglogia Shipping Co. S. A. of Panama (The Mihalios Xilas)* [1979] 1 WLR 1018 Lord Salmon said, at p. 1030:

> If the vessel had not been withdrawn within a reasonable time after the charterers' breach, the right to withdraw it would have been waived by the owners.

Lord Scarman said, at p. 1037:

> Owners were bound within a reasonable time after default to give notice of withdrawal. If they did not do so, they would be held to have waived the default.

[72] In *Gunasingam a/l Ramasingam v. United Malayan Banking Corp and Another Appeal* [2001] 3 CLJ 942, Gopal Sri Ram JCA writing for the Court of Appeal said at p. 944 of the report:

> Secondly, although the motion seeks leave to appeal, what I think the appellant is really asking for is an extension of time to appeal. Since the appellant is acting in person, I am prepared to give him greater leeway than I would have been prepared to grant a solicitor and overlook the elementary errors he has made. Even so, and taking the order in question as being that of the judge, the delay in moving this court is considerable – more than two years. To extend time now would cause much injustice to the finance company. The appellant having done nothing over a substantial period of time, the finance company was entitled reasonably to assume that the appellant had decided not to challenge the order of the judge. To permit an extension would, therefore, destroy that assumption – a legitimate expectation in the finance company that litigation was finally at an end.

[73] Continuing at the same page and spilling over to p. 945 of the report, his Lordship had this to say:

> The facts in respect of the second motion are equally straightforward. The respondent to this motion (entered as Civil Appeal No W-08-226-97) is the United Malayan Banking Corp Bhd ('the bank'). Here, the judgment against which the appellant complains was entered on 23 May 1995. The motion for leave before us – I think what the appellant seeks is an extension of time – was only filed on 7 July 1997. The delay is simply horrific. All what I said in respect of the finance company in the earlier application applies with full force to the bank. I found no

A grounds upon which discretion could be exercised in the appellant's favour. Consequently, I came to the conclusion that discretion should be exercised against the appellant. My learned sister Siti Norma Yaakob and my learned brother Mokhtar Sidin JJCA were in agreement with my views upon the application. The motion was therefore dismissed. The application to adduce further evidence fell with it.

B

All costs in respect of the applications forming the subject matter of this judgment were awarded to the respondents.

C **[74]** These two authorities served as useful guidelines and they must be vigorously applied to the factual matrix of the present case at hand.

Conclusion

D **[75]** For the reasons as adumbrated above, I answered the question of law as phrased and framed in Schedule "A" of encl. 56 in the negative and, accordingly, I dismissed the entire suit with costs. I too ordered that the file to be closed.

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